United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

NO. 75-6136 WRM

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SOUTH WINDSOR CONVALESCENT HOME, INC.,

Plaintiff-Appellee,

v.

DAVID MATHEWS, Secretary of Health, Education and Welfare,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

REPLY BRIEF FOR THE APPELLANT

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1. The plaintiff has totally failed adequately to respond to our demonstration that the district court lacked jurisdiction to entertain this suit.

In United States v. Testan, 44 U.S.L.W. 4245, 4247 (March 2, 1976), the Supreme Court again recognized that

> it has been long established, of course, that the United States as sovereign "is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." United States v. Sherwood, 312 U.S. at 586.

We demonstrated in our main brief, Br. 11-16, that the district court's lack of jurisdiction pursuant to 28 U.S.C. 1331, 28 U.S.C. 1361 and the APA to entertain this suit results from the facts that this suit involves the Medicare

Act. Congress has incorporated 42 U.S.C. §405(h) into that Act (42 U.S.C. 1395ii). 42 U.S.C. 405(h) renders the judicial review provisions of 42 U.S.C. 405(g) exclusive (Weinberger v. Salfi, 422 U.S. 749 (1975)).[1/] 42 U.S.C. §405(g) authorizes suit only in two instances not applicable here. Thus, the district lacked jurisdiction in this case. See United States v. Testan, supra.

In an attempt to escape this argument, plaintiff places principal reliance[2/] upon three post-Salfi decisions[3/] which

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1/ Mathews v. Eldridge, 44 U.S.L.W. 4224 (Feb. 24, 1976) is not apposite. That case concerned the question of whether, assuming the existence of jurisdiction, the plaintiff could maintain the suit despite his failure to exhaust his administrative remedies. Although plaintiff here devotes a considerable portion of its brief to a discussion of the doctrine of exhaustion, the question presented here is whether jurisdiction exists even if plaintiff had exhausted its administrative remedies.

2/ As noted in our main brief, Br. 12, 15, to the extent that the reasoning in the pre-Salfi decisions in Kingsbrook Jewish Medical Center v. Richardson, 486 F. 2d 663 (C.A. 2, 1973) and Aquavella v. Richardson, 437 F. 2d 397 (C.A. 2, 1971), is to the contrary, that reasoning has been disapproved by the Supreme Court in Weinberger v. Salfi, supra.

In any event, even if the reasoning in those two cases remains valid, the cases are not apposite since jurisdiction here lies, if at all, in the Court of Claims. See Br. 16-17.

3/ In addition, to the pre-Salfi decisions of Aquavella v. Richardson, supra, and Kingsbrook Jewish Medical Center v. Richardson, supra, plaintiff relies, App. Br. 14, upon the pre-Salfi district court decision in Gainville v. Richardson, 319 F. Supp. 16 (D. Mass. 1920). Again, to the extent that the reasoning in that case is contrary to the reasoning in Salfi, the case is no longer authoritative.

Plaintiff's reliance upon Aguayo v. Richardson, 473 F. 2d 1090 (C.A. 2, 1973) and County of Alameda v. Weinberger, 502 F. 2d 344 (C.A. 9, 1975) is also misplaced. Neither case involved 42 U.S.C. §405(h).

hold that, notwithstanding 42 U.S.C. §405(h), the federal courts possess jurisdiction under the APA, to review a decision of the Secretary not to reopen a denial of a claim for benefits under the Social Security Act. Lejeune v. Mathews, 526 F. 2d 950 (C.A. 5, 1976), Ortego v. Mathews, 516 F. 2d 1005 (C.A. 5, 1975); Sanders v. Weinberger, 522 F. 2d 1167 (C.A. 7, 1975).

Quite apart from the fact that the status of the APA as an independent grant of jurisdiction is subject to some doubt in this Circuit, see Aguayo v. Richardson, supra, 473 F. 2d at 1101, the Supreme Court decision in Salfi, as we demonstrated in our brief, Br. 12-15, is contrary to the cases upon which plaintiff relies.[4/]

Plaintiff also attempts to circumvent the decision in Salfi by alleging jurisdiction pursuant to 28 U.S.C. 1355. App. Br. 11. However, this contention must fail. This statutory provision was designed to grant exclusive original jurisdiction to the federal courts of an action or proceeding by the national government for the recovery or enforcement of any fine, penalty or forfeiture incurred under any Act of Congress. Morgan v. Bureau of Alcohol, Tobacco, Firearms, 389 F. Supp. 1099, 1100 (E.D. Tenn. 1974). At the very most, the statute provides jurisdiction in a suit by a private individual who possesses standing against another private

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4/ The Secretary was prevented from seeking a writ of certiorari in Lejeune v. Mathews, supra and Ortego v. Mathews, supra, since the Secretary prevailed on the merits. However, the filing of a petition for a writ of certiorari in Sanders v. Weinberger, supra, has been authorized by the Solicitor General.

party upon whom a penalty or forfeiture is imposed by a statute of the United States. See Landau v. Chase Manhattan Bank, 307 F. Supp. 992 (S.D. N.Y., 1973). The statute is not a waiver of sovereign immunity and does not provide jurisdiction in a suit against the United States. Cf., United States v. Testan, supra.

Indeed, the only possible jurisdictional statute which is relevant here is 28 U.S.C. 1491 which confers exclusive jurisdiction upon the Court of Claims. It is significant that plaintiff does not dispute the fact that the only relief it seeks is a money judgment. Since the amount sought is in excess of $10,000, see 28 U.S.C. 1346(a)(2), it is clearly beyond doubt that if jurisdiction exists in this case, it lies solely in the Court of Claims. See Br. 16-17.

2. Plaintiff admits, Br. 23, that the regulation at issue, if considered retroactive,[5/] is unconstitutional only if it can be considered harsh and oppressive. It is clear that considering the nature of the regulation and the circumstances surrounding it, it fully complies with this standard. See, e.g., Welsh v. Henry, 305 U.S. 134 (1938). Cf., Bradley v. Richmond School District, 416 U.S. 696; Thorpe v. Housing Authority of Durham, 393 U.S. 268 (1969).

Plaintiff first contends that the regulation is harsh and oppressive because its period of retroactivity is not limited to one year, App. Br. 20, and plaintiff points to the "hardship" which providers would experience if subjected to an indefinite period of liability. App. Br. 20.

5/ The only "retroactive" feature of the regulation at issue is the portion of the regulation which adds conditions to the use of an accelerated method of depreciation, i.e.,

 (fn. continued on next page)

However, this Court has rejected this very argument. In Kingsbrook Jewish Medical Center v. Richardson, supra, this Court held that "retroactive" regulations are expressly authorized by the Medicare Act, 42 U.S.C. 1395x(v), and that the establishment of an appropriate period of retroactivity is a matter within the discretion of the Secretary.

Plaintiff also contends, App. Br. 21-2, that the regulation is harsh and oppressive because it could not terminate its participation in the Medicare program without payment of the sum at issue between the time of the publication of the proposed regulation and its promulgation in final form.

However, the very regulation quoted by plaintiff, App. Br. 21, states that "the Secretary may accept a notice of termination which is filed less than 6 months before the termination date." 20 C.F.R. 405.613 (1970). There is no evidence in the record to indicate that South Windsor attempted to take advantage of this regulation and its contention that the Secretary would not have permitted it to terminate its participation in less than 6 months is purely hypothetical.

3. Plaintiff contends that the regulation is invalid since it impairs its contract with the Secretary. App. Br. 23-26.

5/ (Continued):
that the difference between the depreciation paid utilizing the accelerated method and that which would have been paid had the straight-line method been used will be recovered if the level of Medicare participation falls or if the provider leaves the program. 20 C.F.R. 405.415(d)(3).

However, Social Security payments are not contractual, Flemming v. Nestor, 363 U.S. 603, 617 (1960).[6] See 42 U.S.C. §1304.

In any event, even if there was a contractual relationship here, the standards as to whether there has been an impairment of that contract are the same as those which are utilized to determine the validity of retroactive legislation. See Hall, The Contract Clause, 57 Harv. L. Rev. 621, 663-70 (1970). As we have demonstrated, the regulation meets those standards.

Moreover, even if there was a contractual relationship, the contract incorporated the statutory provisions, see 4 Williston, Contracts, §§580-583 (3d ed. 1961); G.L. Christian & Associates v. United States, 312 F. 2d 418 (Ct. Cl.), certiorari denied, 375 U.S. 954 (1963), and, as plaintiff admits, App. Br. 27, the statute expressly authorizes retroactive regulations. 42 U.S.C. 1395x(v); Kingsbrook Jewish Medical Center v. Richardson, supra.

4. Plaintiff, contends, App. Br. 2634, that the regulation was not authorized by statute in that the period of retroactivity was not "suitable" as provided in 42 U.S.C. 1395x(v)(1970).[7] According to plaintiff, the "suitable" period authorized by the statute is limited to "the beginning of the current fiscal period or program year in which the regulation becomes effective." App. Br. 30.

6/ Cf. Weinberger v. Wiesenfeld, 420 U.S. 636, 646-67 (1975).

7/ 42 U.S.C. 1395x(v) provides:

> The reasonable cost of any services shall be determined in accordance with regulations establishing the method or

 (fn. continued on next page)

In support of its position on this point, plaintiff relies upon Mount Sinai Hospital of Greater Miami v. Weinberger, 517 F. 2d 329 (C.A. 5, 1975), petition for certiorari pending, Sup. Ct. No. 75-1041. However, that case does not hold that 42 U.S.C. 1395x(v) limits retroactivity to a single fiscal period and, to the extent that the opinion seems to so state, the statement is dictum.

In Mount Sinai, the issue presented was whether, in enacting the Medicare program, Congress intended to abrogate the Secretary's common-law right to recoup payments made to providers for services subsequently determined not to have been medically necessary.[8/] Id. at 337. The Secretary contended that the statute did not abrogate the right. Indeed, the Secretary contended that 42 U.S.C. 1395g and 42 U.S.C. 1395x(v) expressly authorized recoupment of payments for medically unnecessary services.

The Court rejected this contention and held that 42 U.S.C. 1395g applied to retroactive adjustments of determinations of reasonable costs (at issue here) and not the medical determinations at issue in Mount Sinai. Id. at 335-36. The Court then held that 42 U.S.C. 1395x(v) was related to

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7/ (Continued):

> methods to be used, and the items to be included, in determining such costs for various types or classes of institutions, agencies, and services; . . . . Such regulations shall . . . (B) provide for the making of suitable retroactive corrective adjustments where, for a provider of services for any fiscal period, the aggregate reimbursement produced by the methods of determining costs proves to be either inadequate or excessive. . . .

8/ See 42 U.S.C. 1395y(a)(1).

42 U.S.C. 1395g and thus related only to reasonable cost determinations. The Court therefore concluded that the statute did not expressly authorize the recoupment of payments made for services subsequently determined not to have been covered under the Act.[9/]

The only aspect of 42 U.S.C. 1395x(v) which was relevant to the question before the Court in Mount Sinai was that the section authorized recoupment only of payments made in excess of reasonable cost (at issue here) and did not expressly authorize recoupment for payments made for services subsequently determined not to have been medically necessary (at issue in Mount Sinai). The question of whether the "suitable" period of retroactivity authorized by 42 U.S.C. 1395x(v) was limited to a single fiscal period was not before the Court.

In any event, to the extent that Mount Sinai holds that 42 U.S.C. 1395x(v) limits the permissible retroactive period of a regulation to one fiscal period, the decision is in conflict with the decision of this Court in Kingsbrook Jewish Medical Center, supra, and the latter, not Mount Sinai, ought to be followed.

Finally, even if the regulation is not expressly authorized by 42 U.S.C. 1395x(v), the Secretary possesses broad authority to promulgate those regulations which are required to administer the Medicare program, 42 U.S.C. 1302;

9/ The Court went on to hold that despite the absence of explicit authorization of recoupment of payments for services subsequently determined not to have been medically necessary, the Congress had not abrogated the Secretary's common-law right to recoup those payments.

1395hh, and the regulation is valid as reasonably related to the purpose of the Act in that it ensures that payment will be made only for the reasonable cost of services rendered, Mourning v. Family Publications Service, 411 U.S. 356 (1973). See 42 U.S.C. 1395f(b).

5. Plaintiff advances a number of contentions in the portions of its brief entitled "Statement and Statement of Facts and General Discussion", App. Br. 2, 3-10, which are without merit.

Plaintiff contends that the Secretary did not demonstrate that, in the case of South Windsor's assets, the straight-line method of calculating depreciation is more accurate than an accelerated method. App. Br. 5, 7, 9. However, the Secretary's regulation is the result of rule-making and not adjudication. Even if, in some particular instances,[10/] the accelerated method is more accurate than the straight-line method, the regulation would not be invalid for that reason. See, e.g., Weinberger v. Salfi, supra.

Plaintiff contends, App. Br. 6, that the regulation is incomplete in that it does not provide for the recapture of excess depreciation charges from a provider which sells its assets and replaces them with equivalent assets. Insofar, as we understand plaintiff's contention, it is based upon an erroneous assumption. The Secretary's regulations, 20 C.F.R. 405.415(f) specifically provide for the recapture

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10/ We do not concede that this is the case here.

of excess depreciation upon the sale of an asset.[11] In any event, even if the Secretary's regulation failed to apply to all conceivable situations it would not be invalid for that reason. See, e.g., Weinberger v. Salfi, supra.

Finally, plaintiff contends, App. Br. 32-33, that the Secretary's determination to recover the amount at issue here would be contrary to the Secretary's regulations (now found at 20 C.F.R. 405.1885 - 1887 [12](1975)). This contention is erroneous.

11/ Pursuant to this regulation if a provider sells an asset at a loss, the Medicare program assumes that the asset depreciated faster than the amount of depreciation claimed and therefore pays the provider the program's proportionate share of the difference between the sale price and the depreciated value. Conversely, if the asset is sold at a gain, it is assumed that it was depreciated too quickly and the depreciation paid was in excess of the amount which should have been paid. The program will then recapture its proportionate share of the excess depreciation.

The regulation is self-adjusting insofar as the use of an accelerated depreciation method and a straight-line depreciation method is concerned. For example, assume an asset is purchased for $10,000 by a provider whose patient-mix is composed entirely of Medicare patients. The asset is subsequently sold after 3 years for $8,000. If the provider utilized an accelerated method of depreciation and claimed $5,000 in depreciation while it possessed the asset, the Secretary would recover $3,000 ($8,000-$5,000) from the provider. If the provider utilized the straight-line method of calculating depreciation and therefore only claimed $3,000 in depreciation while it possessed the asset, the Secretary would recapture $5,000 ($8,000-$5,000) from the provider.

12/ Plaintiff cites the former number of the regulation (20 C.F.R. 405.499g).

The regulation which plaintiff quotes, App. Br. 32, applies to the situation where the Secretary or the provider wishes to reopen an otherwise final determination as to the amount of reimbursement due a provider because, for example, there has been a mathematical error or there has been an erroneous application of an existing regulation. It was not intended to and does not apply in any way where, as here, a regulation by its terms requires a recalculation due to the occurrence of an event specified in the regulation.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in our main brief, the judgment of the district court should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of April, 1976, I served the foregoing Reply Brief for the Appellant upon counsel, by causing copies to be mailed, postage prepaid to:

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